Probate

JC Hobbs
Assistant Extension Specialist, Agricultural Economics

Note: This publication is intended to provide general information about legal issues. It should not be cited or relied upon as legal authority. State laws vary and no attempt is made to discuss laws of states other than Oklahoma. For advice about how these issues might apply to your individual situation, consult an attorney.

Probate is the process of settling an estate. It is designed to establish who is entitled to receive the decedent's property and the extent and nature of the ownership rights received by each individual. It may be used to establish not only the rights of individuals receiving property under a will, but also the rights of the decedent's creditors and of heirs when no will exists. If rights are established by the probate court, problems and conflicts concerning ownership rights resulting from the death will be less likely to arise later. Although the issues may vary, the probate process is somewhat similar whether the decedent died testate (with a will) or intestate (without a will).

The Probate Court

Initially, a petition is filed in the appropriate District Court stating the time and place the decedent died. The petition also must state the facts necessary to show the court has jurisdiction to probate the estate. Oklahoma statutes specify the following rules for determining which District Court has jurisdiction:

1) If decedent was a resident, the probate petition should be filed in the county of residence.
2) If decedent was a nonresident but died in Oklahoma leaving property in the county where they died, the probate petition should be filed in county where he died.
3) If decedent was a nonresident and died out of state or died in Oklahoma without leaving property in the county where they died, the probate petition should be filed in the county where the property is located. If the estate is located in more than one county, the district court of the county where application is first made has exclusive jurisdiction to settle the estate.

Although Oklahoma statutes attempt to establish rules for probate of estates of nonresidents in certain cases, the statutes of the state where the decedent resided should also be consulted if the decedent was not a resident of Oklahoma. An experienced probate attorney should be able to provide advice concerning the appropriate court to handle the probate process.

If a will is admitted to probate in any other state or in any foreign country, and if it was executed according to the laws of Oklahoma or of the place where it was made or where testator was at the time domiciled, it can be admitted to probate in Oklahoma and will have the same effect on property located in Oklahoma as if it were first probated in Oklahoma.

Oklahoma Cooperative Extension Fact Sheets are also available on our website at:
http://osufacts.okstate.edu

Initiating Probate of a Will

Anyone who has possession of a will must deliver it to the executor or to the probate court within 30 days after learning that the testator is deceased This is required by state statute to help ensure the prompt probate of wills. Failure to deliver the will may result in liability for any resulting damages. Damages might include liability to the heirs for lost interest or lost use of the property or for subsequent destruction of the property. If the individual possessing the will fails to produce it, any interested party may obtain a court order requiring him to produce the will at a designated time. Violation of the court order may result in commitment to the county jail until the will is produced.

Any executor, devisee, or legatee named in the will, or any other interested person (including creditors of the decedent) may petition to have the will probated. The petition must state jurisdictional facts (whether the decedent was a resident, etc.); the name of the executor and whether he or she agrees to serve; the name of the requested administrator if the executor does not agree to serve; the names, ages, and residence of known heirs, legatees, and devisees; and the type and probable value of estate assets.

Notification of Hearing

After the petition for probate is filed, the court will set a hearing date. The hearing will be held ten to 30 days after the petition is filed. At least ten days prior to the hearing, notice of the hearing date must be sent to the last known address of all heirs, legatees, and devisees listed in the petition. Executors must also be notified if they did not file the petition. Registered or certified mail should be used because proof must be offered at the hearing that the notices were sent in a timely manner.

If the names or addresses of some heirs, legatees, and devisees cannot be discovered, notice must also be published in a newspaper at least ten days before the hearing. This notice is usually published even if it appears that all potential heirs were mailed notices, just to ensure that no one was inadvertently omitted.

Will Contests

Any interested person may appear and contest the will. A written statement of the grounds for contesting the will must be filed with the court. Copies must also be served on the person petitioning for probate of the will and any other interested persons residing in the county. Grounds which might be used to contest the probate of the will include incompetency

of the decedent, fraud, duress or undue influence upon the decedent at the time the will was executed, improper execution and attestation of the will by the decedent and subscribing witnesses, a more current later will has been discovered, or that the court lacks jurisdiction to handle the probate.

The testator must have been at least 18 years old and of sound mind at the time the will was executed. Factors which are considered in determining mental competence include:

1) Ability to know and remember the natural objects of one's bounty (close family members who would normally be remembered in a will). These individuals need not necessarily be included in the will as long as the decedent recognized that they existed. However, listing all the known heirs may reduce the chances of a successful contest of the will.
2) Ability to comprehend the kind and character of property owned. It is not necessary that the individual know exactly what he or she owns as long as it appears that a general concept exists. Claims of poverty when considerable assets exist are not necessarily conclusive since poverty is a relative concept and since the individual may be consciously misstating the true situation.
3) Ability to formulate some plan for disposition. The plan chosen need not be the same plan others would choose as long as it appears that the decedent had some plan.

The law presumes sanity. Even in cases where delusions exist, the individual may still have sufficient mental capacity to execute a will as long as the delusions do not affect the disposition of property under the will.

Improper execution and attestation of the will are also grounds for contesting the probate. Oklahoma statutes require that the testator sign the will in front of two witnesses, who sign the will in the presence of the testator and of each other. If the will is contested, all of the subscribing witnesses who are still present in the county and who are of sound mind must testify. If no subscribing witnesses are available, the court may admit handwriting proof and testimony of other witnesses who did not sign the will to prove the sanity of the testator and the proper execution of the will.

Even after a will is admitted to probate, any interested person may contest the validity of the probate within three months after it is admitted. The probate is generally conclusive if no one contests it within three months; however, minors and persons who are mentally incompetent have up to one year after their disabilities are removed to contest the probate.

Costs of the will contest must generally be paid by the losing party although the court may order that they be paid out of estate assets if the probate is revoked.

Oral, Lost or Destroyed Wills

Lost or destroyed wills may be probated if it can be proven that:

1) The will was originally validly executed and witnessed and
2) The will was in existence at the time of the testator's death or was fraudulently destroyed during the testator's lifetime.
3) At least two credible witnesses must establish what the will stated.

Under certain circumstances, oral (nuncupative) wills may also be probated. These wills are only valid in certain limited situations where the testator is in military service, is in fear of immediate death and has a very small estate. Such a will cannot be probated unless two individuals can prove what it said and unless the will was probated within six months after the words were spoken. Six months (rather than three) are allowed to contest the probate of a nuncupative will.

Appointment of Executors or Administrators

The probate court will appoint an executor or administrator to handle the estate settlement process. An executor is in charge of executing the will, while an administrator is in charge of administering the probate in the absence of a will.

Normally a person named in the will as executor will be appointed if he or she is willing to serve. However, if the person named is under the age of majority or has been convicted of a felony, they cannot serve as executor. The court will also not appoint someone judged incompetent to handle the duties of trust as a result of drunkenness, improvidence, or lack of understanding or integrity. The duties of executor represent a major responsibility and the court attempts to ensure the executor is capable of handling such responsibility. Any interested person may object to the appointment of the named executor, and if an objection is made, the court will decide whether the named executor is qualified to serve.

Two or more persons may serve as coexecutors. In such a case, a majority decision will be required for action.

The will may specify the amount of compensation to be paid to the executor. When no compensation is provided by the will or if the executor renounces all claim to the amount specified, Oklahoma law provides for payment of commissions based upon the size of the estate. The statutory commission rate is 5 percent on the first $1,000, 4 percent on the next $4,000, and 2.5 percent on amounts of more than $5,000. The court may authorize additional fees for extraordinary service.

Appointment of Administrators

If the decedent died without leaving a will, an administrator rather than an executor will be appointed. State statutes govern who is eligible to serve as administrator. In Oklahoma, the order of priority for appointment is spouse, children, parents, brothers or sisters, grandchildren, next of kin, creditors, and others. A surviving business partner may not serve as administrator of his partner's estate. If several persons are equally entitled to serve, the court may appoint one or more of them as administrators. No one who is under the age of majority or who has been convicted of an infamous crime or adjudged incompetent by reason of drunkenness, improvidence, lack of understanding, or integrity may serve as administrator.

The procedure for appointment of an administrator in the case of intestacy is similar to the procedure for probate of a will and appointment of an executor. The court will hold a hearing and the fact of intestate death must be proved by testimony of the applicant and others. Any interested person may contest the appointment at any time within 30 days after an administrator is appointed. Administrators are entitled to the same statutory commissions as are provided for executors.

The Probate Estate

Executors and administrators must take an oath to perform their duties according to the law and must post a bond unless the court determines that no bond is necessary.

The first duty of the executor or administrator is to take possession of all estate assets except homestead property. The executor or administrator may sue any person who has wasted, destroyed, or taken any goods of the decedent. Anyone who unlawfully takes money or property of the estate will be liable to the estate for double its value. Assets owned in joint tenancy, property held in a life estate by the decedent, and assets of an inter vivos (lifetime) trust are not generally part of the probate estate. Joint tenancy property would pass to the surviving joint tenant. Life estate property would go to the

remainderman and trust assets would be handled as specified in the terms of the trust document.

Joint Tenancy Property

If real property is held by husband and wife in joint tenancy, the surviving joint tenant should file the following documents with the county clerk in the county where the real estate is located:

1) A certified copy of the death certificate and
2) A notarized affidavit of the survivor that the decedent named in the death certificate was a spouse of the survivor and was the joint tenant named in a previously recorded document. This affidavit should also state the date of death and should identify the book and page where the document is recorded. The filing of these documents constitutes conclusive evidence of the termination of the joint tenancy. A waiver or release of estate tax liens is no longer required.

If the decedent leased a safe deposit box at a bank, the bank must permit the surviving spouse, a parent, an adult descendant, or the executor to examine the contents of the box in the presence of an officer of the bank. A court order may also be obtained by other individuals who have a legitimate reason for examining the contents of the box. Generally, only wills, deeds to burial plots, burial instructions, and life insurance policies may be removed before an executor or administrator is appointed and claims the contents. This rule ensures that property is not removed before it is inventoried for estate tax and distribution purposes. However, if the safe deposit box was held by the decedent and the surviving spouse in joint tenancy, the surviving spouse may remove any or all of the contents.

Homestead and Exempt Property

A surviving spouse may continue to occupy the homestead for the rest of his or her life, and if both spouses are deceased, the children may continue to occupy the homestead until the youngest child becomes of age. Title to the homestead land passes to the legal heirs or under the will subject to the homestead right of occupancy.

In addition, the following property is exempt from all debts and claims against the estate and must be delivered immediately to the surviving spouse and children:

1) All family pictures.
2) The family church pew.
3) Burial lots.
4) The family bible and all books in the family library, not exceeding $100 total value.
5) All family wearing apparel.
6) One year's necessary provisions and fuel for the family
7) All household and kitchen furniture, including stoves, beds and bedding.
8) All personal property exempt from levy and sale on execution by creditors except if no other property is available, such property may be used for payment of necessary expenses of the decedent's last illness and funeral and for expenses of the estate administration.
9) The court may also provide an additional allowance out of the estate assets for necessary maintenance during the estate settlement. If the estate is insolvent, maintenance during settlement cannot last more than one year after appointment of an executor or administrator.

If the decedent is survived by a spouse and no minor child, the exempt property will go to the spouse. If there is no spouse but there are minor children, the property will go the minor children in equal shares. If the decedent is survived by a spouse and one or more minor children, the spouse will receive one-half and the remainder will go to the minor children in equal shares. If the widow has independent income equal to the property set aside for her, all of the exempt property will go the minor children.

Spouse's Elective Share

Oklahoma statutes prevent one spouse from devising, more than one-half of the property acquired by joint industry during the marriage to anyone other than the surviving spouse. State law provides that the surviving spouse may choose to take the same share of property that would have been received if the decedent had died intestate instead of taking the property transferred under the will. This prevents a spouse from being "written out of a will" against his or her wishes. In order to take advantage of this provision, the surviving spouse must make an election in a separate written document (a qualified disclaimer) which is filed with the probate court before the final estate distribution plan is approved. In some cases, the surviving spouse who has sufficient individual assets might prefer to let the estate assets pass to persons named in the will.

Notice to Creditors

A notice to creditors is published in a newspaper within the county once a week for two consecutive weeks. A copy of the notice to creditors is also mailed to all creditors whose address is known or reasonably ascertainable. The notice directs all creditors of the decedent to submit their claims against the estate by a specified date or the claims will be barred from collection.

If a claim is not yet due or is contingent, it may be presented within one month after it becomes due or absolute. If a claimant had no notice by reason of being out of state, its claim may be presented at any time before the decree of distribution is entered. Every claim must be supported by an affidavit that the amount is justly due, no payments have been made which are not credited, and there are not known offsets which might be applied against the claim. If a claim is rejected, the creditor must bring suit within 45 days if it is then due or within two months after it becomes due or the claim will be barred.

Inventory, Appraisal, and Estate Settlement

While the notice to creditors is being published, the executor or administrator prepares an inventory of the real and personal property in the decedent's estate, designating the homestead and exempt personal property. Three disinterested appraisers are appointed by the court. The appraisers determine values of the inventoried property and file a statement with the court. The inventory and appraisal must be completed within two months after the administrator is appointed. At the same time, the executor or administrator must submit a statement of all claims against the estate, the names of the creditors, the type of claim, when it became due, and whether it was allowed or rejected.

The court may authorize an executor or administrator to continue any ongoing business for a reasonable length of time during the estate settlement.

The executor or administrator is responsible for paying the estate debts. The debts must be paid in the following order:

1) funeral expenses,
2) expenses of last illness,

3) family allowance,
4) taxes,
5) debts having priority under state law,
6) judgment liens and mortgages,
7) other claims presented within 2 months after notice to creditors, and
8) other claims.

If the estate is insufficient to pay all the debts of a class, the creditors within that class will be paid a proportionate share.

All nonexempt property may be sold to pay the decedent's debts, expenses of administration, and the family allowance. There is no priority as between personal and real property. The executor must petition the court in writing for a sale order and any interested person may file written objections to the order.

Notice of the sale of personal property at public auction or private sale must be published at least ten days before the sale and must be mailed at least ten days prior to the sale to all heirs, legatees, and devisees whose addresses are known. After the sale, the court must approve the sale. If the sale proceedings were unfair, or the sum bid was disproportionate to the value of the property, the court will vacate the sale and order that another sale be held.

Non-homestead real estate may also be sold under similar procedures. The order of sale must describe the land to be sold and the terms of sale. Land may be sold for cash or for no less than 1/4 cash and the balance on credit for a term not exceeding two years. Notice of the sale of real property must be published once each week for two consecutive weeks. Sales at public auction must be held in the county where the land is located between the hours of 9:00 a.m. and sunset.

Both public and private sales must be confirmed by the court before they are valid. Private sales of real estate will not be confirmed unless the price is at least 90 percent of the appraised value. If an offer of ten percent more than the sale price is made to the court in writing, by a responsible person, before a public or private sale is confirmed, the court may, in its discretion, either accept the new offer or confirm the sale.

If the testator designates in the will that certain assets are to be used for payment of his debts, administrative expenses, or family expenses, the court will honor the request to the extent that the assets are sufficient to cover the expenses. If the will directs or authorizes the sale of estate property, the executor may sell it without court order as long as he complies with the will directions. However, the court must still confirm the sale before title will pass.

The executor or administrator must also file state and federal estate tax returns. If any of the estate is distributed to heirs before estate taxes are paid, the executor or administrator will be personally liable for such taxes until they are paid. A lien is also imposed upon the transferred property until the taxes are paid. However, no tax lien is imposed upon property distributed to a surviving spouse. Executors and administrators must submit a full account and report to the court one year after their appointment. Vouchers must be filed for all charges. A final account must also be submitted before final settlement of the estate. Any interested person may appear and contest the account.

After payment of all debts, the court will order distribution of the remaining estate to the heirs, devisees, and legatees. Any time, at least 4 months after appointment of the executor or administrator, any heir, devisee, or legatee may petition the court for his share of the estate. This might be done if it appears the estate administration would be prolonged, and if the heir was in need of money. The court may not be willing to grant the petition if a controversy surrounds the share which that heir should receive. If the court grants the petition, the heir must post a bond to ensure payment of his proportionate share of the estate debts. The cost of the bond in an estate with many debts may be too high to justify such a petition.

Summary Administration

If the value of real and personal property in the estate does not exceed $60,000, a summary administration procedure may be used. In such a case, a notice to creditors and a notice of hearings upon the accounting, determination of the status as an heir, and distribution and discharge may be combined in one notice. The notice is published for two consecutive weeks and notice of the hearing is mailed to interested persons at least ten days before the hearing. The hearing will not be held until at least 35 days after the first publication of notice.

At the hearing, the executor or administrator must prove that funeral expenses, expenses of the decedent's last illness, administrative expenses, and allowed claims have all been paid. The court will then issue an order allowing the final accounting, determination of the status as an heirs, legatees, and/or devisees and will distribute the property of the estate and discharge the executor or administrator.

Conclusions

This fact sheet was designed to provide some basic information about probate to increase general understanding about the process and to enable individuals to communicate more knowledgeably with their attorneys. The probate process is often complicated, particularly for the executor or administrator. In selecting an executor, care should be taken not only to select someone who is trustworthy, but also to select someone capable of handling the necessary business affairs.

Regardless of who is chosen, it will probably be necessary for the executor to work closely with an attorney in handling all the necessary transactions. The executor generally selects the attorney, since they must be able to communicate well and work together. Although the will may suggest an attorney, the ultimate choice will probably be made by the executor. Attorney fees for estate settlement vary considerably depending upon the size of estate and the degree of difficulty involved. Most attorneys will be happy to discuss how their fees will be computed.

Credit is extended to Marcia Tilley, former agricultural economics professor, for the original content of this fact sheet.

Issued in furtherance of Cooperative Extension work, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture, Robert E. Whitson, Director of Cooperative Extension Service, Oklahoma State University, Stillwater, Oklahoma. This publication is printed and issued by Oklahoma State University as authorized by the Vice President, Dean, and Director of the Division of Agricultural Sciences and Natural Resources and has been prepared and distributed at a cost of 20 cents per copy. 0309